72-215
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-215

REDERI A/B SOYA, AS OWNER OF THE M/V ATLANTIC SONG and ATLANTIC CONTAINER LINE, LTD.,

Petitioners,

versus

EVERGREEN MARINE CORPORATION, S.A. and S. S. CENTRAL TRUST, her engines, boilers, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Rederi A/B Soya and Atlantic Container Line, Ltd., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 9, 1972.

Opinions Below

The opinion of the United States District Court for the Eastern District of Virginia, at Norfolk, is as yet unreported but is printed in the Appendix hereto (pp. 1a-17a). The opinion of the United States Court of Appeals for the Fourth Circuit, also as yet unreported, is printed in the Appendix hereto (pp. 18a-19a).

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 9, 1972 (19a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

Should a tortfeasor be freed from liability for a substantial part of the foreseeable collision damage he has caused on the grounds that if a time charter is involved, no matter the circumstances or new developments in methods of ocean shipping, the 1927 decision of this Court in *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, (Robins) forever after bars recovery by the party termed time charterer?

Did this Court intend to hold in the *Robins* case that if a chartered ship is involved in a collision, one technically designated a time charterer can under no possible circumstances recover for his damages?

Did the Court contemplate the present developments in container operations, where, because of the enormous expense of initiating such service, many shipping companys have banded together into consortiums, such as Atlantic Container Line, Ltd. (ACL)?

Should not a consortium consisting of six foreign vessel owning corporations which have contributed the use of ten vessels built to ACL's specifications for a ten per cent share in the consortium for each vessel contributed be entitled to damages for its loss of the use of one of those vessels caused by respondents' negligence?

Should the mere fact that the technique used for corporate purposes to transfer control of the vessels to the consortium was a time charter thereby deprive the consortium, and indirectly the vessel's titular owner, a twenty per cent shareholder in the consortium, of that loss of use, particularly when the charter hire was a minimal amount for internal purposes bearing no relation to the actual value of the *Atlantic Song's* services which would have been the basis for charter hire in normal charter arrangements between independent parties?

Why should a time charterer be denied recovery for his loss of use when cargo, whose presence and damage is no more foreseeable, can recover from the colliding ship?

Since recovery was permitted for damage to the time charterer's containers and to the cargo which they held, why should not recovery be permitted for loss of use of the vehicle transporting those containers which is a vital part of the joint operation?

Statement of the Case

This action arose out of the collision between the Container Ship *Atlantic Song,* owned by Rederi A/B Soya (Soya), but chartered for twelve years to Atlantic Container Line, Ltd. (ACL), and the *Central Trust,* owned by Evergreen Marine Corporation, S.A. (Evergreen), on November 17, 1969. Petitioners, Soya and ACL, filed their complaint on March 5, 1970.

The loaded *Atlantic Song* had just taken her departure from the Hampton Roads area of Virginia bound for Europe when the light *Central Trust,* coming down the Atlantic Coast, rammed the *Atlantic Song's* port side at almost right angles, causing extensive damage. The heavier construction of the *Atlantic Song* prevented what otherwise might have been her sinking. The prime fault of the *Central Trust* was acknowledged by Evergreen's agreement to pay 75% of Soya's and ACL's provable damages. After liability was settled, further testimony was taken on the damage question and trial was had only on that issue.

The *Atlantic Song* was a unique type of container vessel also having roll on-roll off cargo vehicle facilities, and it was not possible for ACL to charter a similar vessel to replace her to carry the cargo available to her. The parties agreed to most items of damage including charter

hire lost by Soya at the rate of $3,860.00 per day for the period required for collision repairs. They disagreed as to the collectability of the loss to ACL (calculated to be $308,000) over and above the nominal charter hire awarded Soya. The District Court concluded (p. 17a) that ACL did not, as time charterer of the *Atlantic Song*, " * * * have legal standing to recover from the defendants any damages for loss of profits or loss of hire of the vessel."

The question of how to measure the *Atlantic Song's* loss of use is different from the normal tramp charter, since the ownership and operation of the vessel in liner service is governed by a complicated consortium arrangement. The vessel's "technical" owner, Soya, is a 20% shareholder or owner of ACL, the "technical" charterers of the vessel, having contributed two of the line's ten ships. Charter hire is a fictitious figure not based on the vessel's value, but rather to pay off her building cost over the 12 year term of the charter, plus certain operating costs. Soya would receive no profits directly but rather would receive them indirectly through its 20% participation in the ACL consortium.

ACL, a Bermuda corporation, is a common carrier by water running a liner service with its 10 container ships between Europe and United States North Atlantic ports. The original subscribers to ACL shares were Holland-America Line, Swedish Transatlantic Line, Swedish American Line, and Wallenius Line (Soya), as shown by an agreement, designated No. 9498 by the Federal Maritime Commission. Cunard Line and French Line subsequently became parties to the agreement and are 20% shareholders in ACL, each having contributed two ships.

Under their agreement, the parties undertook to form a corporation whose objectives required

> "* * * a cooperative arrangement among the parties looking toward co-ordinated management of their vessels and all related activities * * *"

The corporation was to have stated powers, among which were:

> "(a) to charter vessels from the respective parties and to operate such vessels (each under the national flag of its owner) between any ports in the range now served by any of the parties, * * *
>
> "(b) to acquire equipment and other property for use as may be deemed appropriate in connection with operation of such vessels. * * *;
>
> "(c) to file its own tariff or make itself party to an existing tariff on file with the Commission."

As the container ships to be contributed by the various member companies were built, they were time chartered to ACL for periods of 12 years. The charter party between Soya and ACL covering the *Atlantic Song* had important features in common with a demise charter in that it covered an appreciable proportion (12 years) of the vessel's economic life, and committed all important aspects of the use and control of the vessel to ACL, substantially as if ACL were the owner. Deleted from the charter was a printed provision giving the owner certain dispensations to withdraw the vessel from charter. The owner is "not to be responsible . . . for damage to cargo or delay whatsoever . . . even if caused by the negligence or default of their servants." The Charterer is required to provide and to pay for through transport liability insurance, cargo equipment insurance and P & I insurance covering Charterers' liabilities as well as owners' (with stated exceptions). The Charterer is to handle all cargo claims; all claims regarding injury to stevedores; all tort claims by the crew against the owner; and "any other P & I claim recoverable under the combined P & I policy."

The charter arrangements were

> " * * * required for a number of reasons, amongst them mortgages, legal, insurance and other reasons.

> The way we treat the vessels in fact is as dedicated vessels to Atlantic Container Line Limited * * *."

Although a fairly standard charter form was used " * * * the rate which is included is in fact a full capital and interest pay out * * *." The principals decided that since each vessel was funded over 12 years "out of money which would otherwise have been available in proportion to share capital * * *.", the residual value should be shared in proportion to share capital. In other words

> " * * * if after 12 years the vessel is sold and there is some residual value * * * each owner would have an interest in that residual value based upon his percentage interest in * * * (ACL)."

The District Court mentioned some of petitioner's arguments in favor of ACL's right to recover for its loss of the *Atlantic Song's* use and the non-applicability of *Robins Dry Dock & Repair Co.* (*Robins*) v. *Flint*, 275 U.S. 303 (1927) but held that case controlling and stated that the Fourth Circuit has held that

> " 'a subordinate court should not reach out to anticipate the Supreme Court's future resolution of the point.' " and " 'It is not for us, however, to overrule or modify decisions of the Supreme Court.' " (p. 16a)

The Fourth Circuit affirmed that District Court merely stating that " * * * Until the Supreme Court chooses to reconsider *Robins Dry Dock & Repair Company* v. *Flint*, 275 U.S. 303, that decision is binding upon us."

Reasons for Granting the Writ

1. *Robins Dry Dock & Repair Co.* v. *Flint*. 275 U.S. 303 is being incorrectly applied to all possible charter situations to prevent recovery for loss of the charterer's

use despite developments which render its applicability questionable.

The District Court based its opinion on the sole ground that *Robins* covered all possible time charter situations and that it was not its function to modify this Court's decision, despite the facts here involved and developments since *Robins* was decided. It, therefore, restricted the *Atlantic Song's* detention damages to charter hire lost by Soya and denied ACL any recovery for loss of use.

In the *Robins* case, the trial court permitted recovery on the tort theory, holding that the charterer had a property right in the vessel. The Court of Appeals for the Second Circuit, *Flint* v. *Robins Dry Dock & Repair Co.*, 13 F. 2d 3 (2d Cir. 1926), permitted recovery for a different reason, relying upon collision law cases which permitted a time charterer to recover against the offending vessel. *The Aquitania*, 270 F. 239 (S.D.N.Y. 1920); *Hines* v. *Sangstad SS Co.*, 266 F. 502 (1st Cir. 1920); and *The Beaver*, 219 F. 139 (9th Cir. 1915). The Second Circuit expanded upon these collision law cases, holding that the charterer had an interest in the vessel although the vessel was off hire when the damage occurred and analogized its position to that of a bailee.

This Court, however, reversed the Court of Appeals and held that no analogy to the bailor/bailee derivative rights could be drawn from the particular facts of the *Robins* case, since the owners' recovery was based "* * * upon a contract for damage and delay." (p. 309)

This Court, by relying upon the fact that the vessel owner's cause of action against *Robins* was in contract, impliedly suggested that where the owner's cause of action lies in tort, the bailee recovery theory might well be analogous. This Court commented that since the owner had not in fact sought to make recovery on behalf of the charterer and itself, the suggestion that it might have

done so was unavailing to the charterer, which was suing alone, particularly when the owner recovered for damage and delay on a contractual basis. However, this Court did not specifically overrule, criticize or even mention those collision cases relied upon both by the Second Circuit below and by the charterer on appeal.

The *Robins* opinion has only been cited on two occasions by this Court and both times has been carefully distinguished. See *A.S. Cuzco* v. *The Sucareco*, 294 U.S. 394, 404 (1935); and *Caldarola* v. *Eckert*, 332 U.S. 155, 158 (1947). The lower courts, on the other hand, including the District Court and the Fourth Circuit Court of Appeals in the present matter, have considered themselves bound by *Robins* in a variety of contract situations. Also there has developed a substantial line of cases which deny the right of the charterer to recover for loss of use of the vessel under all circumstances, arising in either contract or tort.

Thus, in *Agwilines, Inc.* v. *Eagle Oil & Shipping Co., Ltd.*, 153 F. 2d 869, 872 (2d Cir. 1946), *cert. denied*, 328 U.S. 835 (1946), where the owner of the chartered vessel sought to recover for loss of use, relief was denied on the basis of *Robins:*

> "In the face of this decision we cannot see how we can do otherwise than affirm the decree at bar; if any change is to be made the Supreme Court must make it."

The majority opinion recognized that, absent a time charter, the owner is entitled to recover for loss of profits under the contracts of affreightment as a measure of damages for detention; but, by chartering the vessel, the owner was held to have limited his measure of damages to the amount of hire. The value of the vessel's use is assigned to the charterer; and, under the alleged doctrine of *Robins*, there can be no cause of action in favor of the

charterer for loss of use due to negligent interference with the performance of the charter contract.

The dissenting opinion of Judge Clark (p. 872) recognized the windfall thus accorded the colliding tortfeasor:

> "* * * we have the rather startling result that claimant (owner of the colliding vessel) receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another."

He objected (p. 873) to the unwarranted and unsound extension of *Robins* beyond its facts (breach of a dry dock contract) to a collision case:

> "* * * the decision cannot properly be wrested from its facts to justify a new and unusual rule of damages."

Nevertheless, the courts have wrested *Robins Dry Dock* from its facts, and, most recently in the instant case, have extended it in a fashion that unfairly denies to a time charter equal protection of the law. Whereas the owner may recover for loss of use of a non-chartered vessel, and cargo may recover for its damages, there can be, under the distorted construction of *Robins*, no relief granted to any time charterer.

2. *Robins* should not apply to collision cases in which both foreseeable parties in interest, the owner and time charterer, are parties to the action.

Robins was not a collision case and to apply its reasoning to such cases works considerable inequities such as in the present situation which provides a windfall for the party acknowledging 75% fault. If Soya had no charter arrangement with ACL, according to the District Court's theory, it could recover the *Atlantic Song's* full loss of earnings. *The Potomac*, 105 U.S. 630, 631 (1881); *The Conqueror*, 166 U.S. 110 (1896). Similarly, according to

the District Court's theory, ACL could recover its full loss of earnings if the charter were termed demise rather than time. However, both parties entitled to recover are before this Court as plaintiffs so that the full loss of earnings can be awarded. It would be inequitable for the *Central Trust* to escape full responsibility for the loss caused merely due to the technicality of a chartering arrangement of which the tortfeasor knew nothing.

The reasoning in recent cases questions the extent to which the applicability of *Robins* has been carried.

In *Carbone* v. *Ursich*, 209 F. 2d 178 (9th Cir. 1953) fishermen aboard one vessel sued the vessel which damaged their net for loss of fish in net and of the prospective catch during repairs. The lower court had denied recovery, based upon *Borcich* v. *Ancich*, 191 F.2d 392 (9th Cir. 1951) and the Court of Appeals decided to overrule so much of that decision which denied recovery to the fishermen (p. 179). The court said it concluded in the *Borcich* case that *Robins* had laid down a rule requiring them to hold the fisherman had no action against the tortfeasor (p. 180). After reviewing the authorities, it was satisfied that *Robins* did not establish such a rule contrary to the prior doctrine, and the tortfeasor's liability was enforceable by both the owner and the fishermen (p. 181).

There was some discussion whether the fishermen's recovery should be by direct action or through the vessel owner. However, the Court of Appeals found both necessary parties before it and under those circumstances concluded that the fishermen could recover (p. 182). Convinced that the *Borcich* case was wrong,

> "* * * we feel impelled now to overrule it, for failure to do so would mean a withholding from fishermen of all redress for tortious interference with the progress of the voyages which are their livelihood. * * *." (p. 183)

This language could be applied to the present case. All necessary parties representing the totality of interests in the *Atlantic Song* case are before this Court and complete relief can be given.

The reasoning in *Petition of Kinsman Transit Company,* 338 F. 2d 708, 723-724 (2d Cir. 1964) is apropos with relation to the foreseeability of ACL's involvement:

> " * * * we would find it difficult to understand why one who has failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons that were fairly foreseeable when he fell short of what the law demanded. * * * We go only so far as to hold that where, as here, the damages result from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability * * *." (p. 726)

> " * * *. The shipowner and the wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence * * *." (p. 722)

In *Petition of Kinsman Transit Company,* 388 F. 2d 821, 823-825 (2d Cir. 1968), Judge Kaufman, referring to the fact that *Robins* denied tort recovery for negligent interference with contractual relations in the absence of proof that the interference was intentional or with knowledge of the existence of the contracts, stated:

> " * * * We hesitate to accept the 'negligent interference with contract' doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law pro-

> tects. * * * Moreover, several cases often cited as illustrations of the application of the 'negligent interference with contract' doctrine have been convincingly explained in terms of other, more common tort principles. See 1 Harper and James, The Law of Torts, 505-10 (1956). Indeed, Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. *Id.* at 501. We therefore prefer to leave the rock-strewn path of 'neligent interference with contract' for more familiar tort terrain. * * *.
>
> "In the final analysis, the circumlocution whether posed in terms of 'foreseeability,' 'duty,' 'proximate cause,' 'remoteness,' etc. seems unavoidable. As we have previously noted, 338 F. 2d at 725, we return to Judge Andrews' frequently quoted stated in Palsgraf v. Long Island R. R., 248 N.Y. 339, 354-355, 162 N.E. 99, 104, 59 A.L.R. 1253 (1928) (dissenting opinion): 'It is all a question of expediency * * * of fair Judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.' "

3. ACL, and similar consortiums, are a new form of vessel operation which does not fit into the typical time charter pattern and should not be governed by *Robins*.

ACL is a corporation formed by six leading shipping companies (*supra*, p. 6). The finance director of Atlantic Container Line Services Limited, management advisory company for ACL, described the relationship of Soya and ACL as follows:

> "Yes it is related in two particular ways. First of all Wallenius owns 20% of the shares of Atlantic Container Line Limited. Secondly as one of the partners in Atlantic Container Lines Limited, it provides two of the vessels which we use in our ten vessel system. We refer to our shareholders, one of them being Wallenius, as partners, because Atlantic Container Line Limited, in a de facto sense, is

a consortium partnership even though it is a separately incorporated Limited Company."

It is evident that ACL is a "line" organized as such and performs the functions of a steamship line with its chartered vessels in precisely the same fashion as any steamship company which is the owner of the vessels it operates. Its status as a line is illustrated by its certificate of incorporation; by its basic agreement approved by the Federal Maritime Commission; by the terms of the charter parties under which it hires its vessels for a large proportion of their economic life; by the ownership-type obligations which it assumes under such charters; and by the responsibilities assumed for cargo, both under the charters and under its bill of lading.

There was a close interrelation among the six vessel owners making up ACL in the scheduling and operation of these vessels built for ACL, to ACL's specifications and paid for with funds provided by ACL derived from the operation of the vessels.

The *Atlantic Song* and her sisterships could have been built directly by and for ACL, but the charter set-up was used "* * * for a number of reasons, amongst them mortgages, legal, insurance * * *."

The *Atlantic Song,* owned in the name of Soya, was the subject of a twelve-year time charter to ACL, of which Soya is a 20% owner. The other ACL owners own the eight remaining vessels in the "Atlantic Container Line" fleet. The charter party assigns many incidents of vessel ownership and responsibility to ACL, which was, in effect, the owner *pro hoc vice* of the *Atlantic song.* The charter hire was not negotiated by business adversaries at arm's length, but rather was calculated pay for the vessel's construction costs and operating expenses.

ACL did not merely rent space but took on legal obligations to third parties such as cargo, longshoremen or sea-

men, which are said in *Wyche* v. *Olendorff*, 284 F. Supp. 575 (E.D. Va. 1967), to be evidences of ownership. In the *Atlantic Song* charter, ACL has assumed considerable responsibility in those areas. It provides that ACL should handle "all cargo claims", "all claims regarding bodily injury to stevedores" and "all recoverable claims in respect of crew against Owner in tort." Obviously ACL has basic ownership responsibilities and should be permitted to recover its loss of use.

The basic agreement setting up the proprotions of ACL ownership allocates 20% to Soya, the *Atlantic Song's* titular owner. After the 12 year charter period is over each vessel may be sold and the residual value distributed not to titular owners, but among the partners in proportion to their interest.

Both lower courts assumed erroneously that this matter, like any other time charter case, was governed by *Robins*. This type of relationship of vessel to owner and operator, such as ACL, which is directly involved through the design, operation, control and ultimate residual interest in the proceeds of the *Atlantic Song's* sale, has not been before the courts in this country with the type problem here involved. Further, this is not a simple time charter problem, as is evidenced by the agreement filed with the Federal Maritime Commission which stated one of the purposes in setting up ACL to be:

> "Achievement of the contemplated objectives requires a cooperative arrangement among the parties looking towards co-ordinated management of their vessels and all related activities * * *."

The District Court forces the *Atlantic Song*—Atlantic Container Line relationship into a conventional time charter mold. However, this is not a normal time charter relationship. The fact that the *Atlantic Song's* "fictitious" or "nominal" charter hire was $3,860 per day does not

mean that was her actual worth. ACL's loss over and above that figure was $308,000.

The many differences between this case and Robins clearly distinguish the latter. *Robin's* was decided on a rather narrow factual basis which certainly bears no relationship to the *Atlantic Song,* Soya, ACL relationship.

It seems inequitable that merely because a charter form was chosen, ACL, the dominant interest in the *Atlantic Song* operation, should be prevented from recovering its damages, which includes that of her titular owner, Soya. The tortfeasor should not be permitted to avoid responsibility for its actions in such a situation.

Time, of course is money in any business, but delay is a matter of particular concern in a time charter agreement. Thus, it has always been important that productive time be maximized. Given the extraordinary cost of supporting modern container vessels and mammoth organizations and terminal operations behind them, time has now become critical. To deprive a time charterer of the use of his vessel, even assuming suspension of hire, is to deprive him of the basic commodity in which he deals; that commodity is time. For this reason, any rule of law which denies compensation for the loss of time under these circumstances is of serious concern to the entire shipping industry. Owners, charterers and shippers alike, both at home and abroad, have an interest in the outcome of this case because of the impact of this issue on the basic fabric of vessel ownership and operation as developed in modern international commerce.

Various other vessel owners throughout the world are using or considering this new and unique manner of doing business, which now has been denied the protection accorded non-chartering owners in collisions.

The opinions below, review of which is sought herein, deny the rights of the owner and the time charterer to recover damages for the loss of use of the *Atlantic Song*

based on the purportedly binding effect of *Robins*. The decisions were clearly erroneous; and, more important, they conflict with well-established precedent of this Court to the contrary. It was early held that the owner of a vessel which had been damaged by collision could recover for property damage and delay. *The Baltimore*, 75 U.S. (8 Wall.) 377, 385, 19 L.Ed. 463 (1869). The measure of that loss of use during repairs is the amount the vessel would have earned if not disabled. *The Potomac*, 105 U.S. 630, 26 L.Ed. 1194 (1818).

The holding of the District Court, affirmed on appeal, wherein both the owner and the time charterer of the *Atlantic Song* are denied the right to recover for loss of use of their vessel, is a clear departure from those prior decisions. However, the holdings below are consistent with other lower court cases which, in mistaken deference to *Robins*, deny the right of a time charterer to recover for loss of use of the vessel under all circumstances. See, e.g., *Agwilines, Inc.* v. *Eagle Oil & Shipping Co., Ltd.*, 153 F. 2d 869 (2d Cir. 1946); *cert.* denied, 328 U.S. 835 (1946). Nevertheless, the *Robins* rationale is not addressed to the collision problem, and application of *Robins* under these circumstances produces shocking results.

This Court in *Moragne* v. *States Marine Lines*, 398 U.S. 375, 403 (1969) stated that:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among those are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reason for rejecting any established rule must always be weighed against these factors."

We believe that this Court should similarly evaluate the present status and applicability of *Robins*.

4. It is evident from the opinions in this case and others in which *Robins* is cited that clarification is required from this Court to prevent substantial injustice since many lower courts blindly and unthinkingly follow the supposed rule that no time charterer can recover for loss of use.

The distinguishing facts set forth by this Court in *Robins* were not present in this case since both the owner, Soya, and the charterer, ACL, are present before this Court attempting to recover for the full loss of the *Atlantic Song's* use. Although this Court did not specifically so state, perhaps because *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339 (1928) had not yet been decided, it must have been influenced by the remoteness of the charterer's damages in the *Robins* case.

However, the *Robins* decision, when carefully analyzed in the light of its lower court history, means no more than that this Court in 1927 was unwilling to extend to a charterer, having no relationship to the owner or vessel other than the charter party, the right to recover from an independent contractor against whom the owner had already settled its contractual cause of action, particularly when the vessel was not on hire when the casualty occurred. The case at bar is readily distinguishable since a completely different factual situation exists.

(a) Soya and ACL are not separate entities relying on an arm's length charter relationship, but rather are so intimately related in the consortium that their individual interests cannot be separately considered. The original agreement provides that no party may sell its stock in ACL without the consent of all other parties, and that

> "Achievement of the contemplated objectives requires a cooperative arrangement among the parties looking towards coordinated management of

> their vessels and all relative activities. The purpose of this agreement is to provide for such cooperation. * * *"

(b) *Robins* was decided in 1927 when the maritime business was far less sophisticated, when container ships were not in operation, and such complicated forms of conducting business as the consortium were not used.

(c) The six owners, making up the ACL consortium, each have an interest in all ten of the vessels now technically owned by them individually and chartered to them as a group. The residual value in each vessel, upon its sale at the end of the 12 year charter period during which the so-called charter hire would have covered the capital construction costs and interest, is shared in the proportion set forth in the agreement and does not go to the "technical" owner of each vessel.

(d) Soya's cause of action is in tort and not in contract, and both owner and charterer are suing jointly.

(e) The *Atlantic Song* was on hire and carrying loaded ACL containers when the tort was committed.

Despite this, both the District and Circuit Courts claimed they could do nothing until this Court had spoken. (16a, 26b) Obviously some clarification is required.

5. *Robins* should not, by its terms, apply to cases in which the tortfeasor knew or should have known of the charter but is being applied incorrectly by the lower courts.

Robins, 275 U.S. 303, 308, stated the question being considered was whether charterers would be protected " * * * against unintended injuries inflicted upon the vessel by third persons who knew nothing of the charter." In the present case, the danger of such an unknown third party did not exist; on the contrary, the *Central Trust* would have had some difficulty determining that Soya was the *Atlantic Song's* owner. The *Atlantic Song* is named

as part of the ACL fleet; all nine sisterships also bear the Atlantic name; she is advertised as being one of ACL's ten liner service vessels; the ACL symbol is painted in large letters along her side; and all the containers tiered throughout her deck area were clearly marked with the ACL name.

To the *Central Trust,* or anyone else coming into collision with the *Atlantic Song,* the apparent owner and evident damaged party would have been ACL. The *Central Trust's* crew could obviously have seen, even before the collision, that this was an ACL ship. The lack of awareness of the charter referred to in *Robins* is certainly not a factor here, nor would it be in other similar consortium operated fleets. The *Atlantic Song* was apparently owned, operated and controlled by ACL and respondents herein rely upon mistaken interpretations of *Robins* by the lower courts because of the uncertainty as to the application of the case. *Robins* should be clarified and updated to prevent the substantial inequities being wrought in its name both now and in the future.

The actual, practical effect of the decision herein will be to create disastrous consequences for other litigants similarly situated should their vessels be involved in collisions.

6. It is inequitable to permit cargo to recover in full for its collision damages from the non-carrying vessel and to deny recovery to the container ship charterer who provides the cargo carrying facilities.

If cargo damage occurs as the result of a collision, cargo can recover in full from the non-carrying vessel which may then include such payment in its damages, *The Chattahoochee,* 173 U.S. 540 (1899). This proposition is stated in the Final Order (21a) and covers the amounts paid by the *Central Trust* in settling the claims of cargo in the *Atlantic Song's* containers. The direct liability of the non-

carrying vessel "for all of the damages to cargo" is "one of the consequences plainly to be foreseen." *Erie R.R.* v. *Erie & W. Transp. Co.*, 204 U.S. 220 (1907).

The Final Order (19a-20a, 23a) also awarded ACL compensation for damage to its containers and other related expenses. If the *Atlantic Song's* cargo can recover from the *Central Trust* for its damage as a foreseeable consequence of the collision, and ACL can recover for the damage to its containers in which that cargo was carried, we cannot logically see why ACL should not also recover for its loss of use of the vehicle which transported the containers which are "* * * functionally a part of the ship * * *." *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971). The fact that a vessel might be under charter is certainly no less foreseeable than that she might have cargo aboard. Further, here we do not have the normal market charter relationship.

By any of the standard tests, the *Central Trust's* ramming of the *Atlantic Song* was the proximate cause of ACL's damages. There was a wrongful act committed by the *Central Trust* directly affecting ACL and there is a reasonable chain of causation between the wrongful act and the injury suffered by ACL.

It seems inequitable that ACL should recover for damage to the containers, yet be denied recovery for its share of the loss of the overall operating entity which it controls. The proper measure of damages is the loss to the entity of the *Atlantic Song's* full earning capacity and not the fictitious charter hire standard established by ACL for intercorporate purposes.

ACL is but one of a number of such recently organized container consortiums each made up of individual shipping companies banded together, as we have mentioned, to set up joint operations because of the tremendous expense in building container ships and obtaining and operating

shore handling facilities. Many more such consortiums are in the planning state. Obviously this is a new type of operation not visualized in *Robins* which cannot be fitted into the mold created for *Robins* and which should be be protected by law against tortfeasors, such as the *Central Trust*.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

David C. Wood

IN THE

United States District Court

For the Eastern District of Virginia

Norfolk Division

Civil Action No. 147-70-N

—o—

REDERI A/B SOYA, as owner of the M/V ATLANTIC SONG, and ATLANTIC CONTAINER LINE, LTD.,

Plaintiffs,

v.

EVERGREEN MARINE CORPORATION, S.A., and SS CENTRAL TRUST, her engines, boilers, etc.,

Defendants.

—o—

Memorandum Opinion

On November 17, 1969, the *SS Central Trust* was in collision with the *M/V Atlantic Song*. Each vessel was substantially damaged, and was out of service for a period of time. This suit followed.

The parties have stipulated that plaintiffs recover from defendants seventy-five percent (75%) of their provable damages and taxable court costs, and that defendants recover of and from plaintiffs twenty-five percent (25%) of their provable damages and taxable costs.[1] Most of the items of damage sustained by each of the parties

[1] Supplemental order on final pretrial conference.

were stipulated and agreed upon.[2] The issues remaining are four:

> (a) Must five (5) days be deducted from the claim of *Atlantic Song* of 19 days, 18 hours, 21 minutes required to complete her repairs, because of her already scheduled annual overhaul, the collision repairs having been deferred until this time?
>
> (b) Must ten (10) days be deducted from the claim of *Atlantic Song* as a result of replacement of oil gland seal on the vessel's propeller, following a finding of a wire around the shaft of the propeller?
>
> (c) Whether or not the time charterer of the *Atlantic Song* has any legal status to recover alleged damages from the owners of the *SS Central Trust* in addition to that claimed by the owner.
>
> (d) Whether the *Central Trust* is entitled to recover detention for the days after her departure from the shipyard and while awaiting a berth at Houston.

I

> (a) Must five (5) days be deducted from the claim of *Atlantic Song* of 19 days, 18 hours, 21 minutes required to complete her repairs, because of her already scheduled annual overhaul, the collision repairs having been deferred until this time?

Following the collision the *Atlantic Song* returned to Newport News Shipbuilding Drydock for survey and temporary repairs. Thereafter, it continued on its journey to ports in Europe and to the shipyard in Sweden. The credible evidence establishes that *Atlantic Song* was scheduled

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[2] Order on pretrial conference filed April 23, 1970, and supplemental order filed May 11, 1970.

to enter the shipyard for its annual overhaul when it returned to Europe at the end of the voyage on which the collision occurred.[3] Its last annual overhaul was in September 1968. It was aware of the fact an annual overhaul was to be made not later than each 18 months. The testimony established five days would be required, during which the bottom would be scraped and painted, minor repairs, painting and general annual overhaul done. Other than the two days delay in entering the shipyard at Newport News for temporary repairs—and the making of the repairs caused by the collision—the general overhaul continued as scheduled.

There is plausible argument and reasoning supporting the contentions of *Atlantic Song,* as well as to the contentions of *Central Trust.* Decisions of the courts on such an issue are rather limited, with some conflict. But, it seems a majority of the holdings support the contentions raised by defendants. To me, the better and more equitable reasoning supports that holding. That is, where a vessel has collision repairs made at a regular scheduled overhaul of the vessel, the time required for the regular scheduled overhaul must be deducted from any loss of profits of the vessel while it is out of service.

We commence with what seems to be the general rule, namely, that if the owner of a damaged vessel immediately puts her in drydock to repair collision damage, and while there seizes the opportunity to make other repairs, which do not extend the time required for making the collision repairs, the wrongdoer may not abate his damages. *Clyde S.S. Co.* v. *City of New York,* 20 F.2d 381 (2d Cir. 1927),

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[3] Testimony of Surveyor Scott—told by owner's representative who came from Norway; the Captain and Chief Officer; Testimony of Surveyor Fife—told by Master of the vessel; testimony of 2nd mate of vessel, Hakansson; testimony of Surveyor Gravers; Testimony of Wilson, Superintendent of Repairs for A/S; and testimony of Surveyor for A/S.

and cases there cited. The reason given is that the wrongdoer cannot say the detention and therefore the loss would have been less, had the owner deferred his own repairs. It required the vessel to be taken out of use, and must have lost her earnings during all of that period. It "is that loss and that alone which is the basis of detention damage." The *Clyde case, supra.* He would have lost the same use of the vessel if he had not made his own repairs. The Court continued in the *Clyde case:*

> But if the ship would in any event go out of commission, collision or no collision, and if therefore, during the period when the collision repairs are actually made, she would have earned no profits for her owner, he cannot be said to have been damaged. The collision has not deprived him of earnings which he would have made at that season. This we understand to be the doctrine of the House of Lords in Ruabon S.S. Co. v. London Assurance Co., L.R. [1900] App. Cas. 6, though the circumstances were quite different. The Court of Appeal applied it to the case of successive tort-feasors. The Haversham Grange, L.R. [1905] Prov. Div. 307, an extremer decision, the correctness of which we need not consider. See, also, The Chekiang, 21 Lloyd's List Reports, 179; The Suruga, 14 Lloyd's List Rep. 579.
>
> While, so far as appears, the point has never come up in this country, it seems to us very plain in principle that the District Court was right.

As stated above, the evidence is clear the *Atlantic Song* had scheduled itself to go out of commission, collision or no collision, and during that time would not have earned profits, hence, he did not suffer damages for the five day period.

The next year after the decision in *The Clyde case,* the same issue was before the same Court. Judge Learned Hand, writing the opinion in *Pan-American Petroleum & Transport Co.* v. *United States,* 27 F.2d 684 (2d Cir. 1928), affirmed his former opinion. There the Court reversed the holding of the district court. The district court had thought it made no difference whether the collision repairs were in fact immediately necessary, so long as the owner believed it prudent to make them at the time. In stating its agreement with that statement, the Appeals Court said, "provided the owners conclusions be well founded." Continuing, the Court said, "an owner may not seize the opportunity offered him by a collision to advance his periodic overhaul, and make owner's and collision repairs together. . . ." *Atlantic Song* did not advance its periodic overhaul, it merely continued with its previously arranged schedule. To hold otherwise in this case would permit the owner to continue with his regular schedule as if no collision had occurred and require *Central Trust* to pay him for a loss he did not and would not have sustained. That is to say, that for the wrong, *Central Trust* must pay a profit to the owner which he would not have earned. The rule for damages in admiralty causes is the actual pecuniary loss. *The Conqueror,* 166 U.S. 110, 126-7, 134. And as said in *Moore-McCormack Lines* v. *The Esso Camden,* 244 F.2d 198 (2d Cir. 1957), "Demurrage is recoverable only when profits have actually been, or reasonably may be supposed to have been, lost, and such profits can be proven with reasonable certainty." To recover demurrage, the owner must show the vessel would have been profitably employed during the period of detention. *The Agwidale,* 61 F.Supp. 191 (S.D. N.Y. 1945), and cases there cited.

In *Moore-McCormack Lines* v. *The Esso Camden, supra,* in dealing with an issue of whether the demurrage claim should be 17 and a fraction days, or two days should be

deducted because of a scheduled layoff for work to be done on her bulkheads, the Court said: [244 F.2d 203]

> We turn now to the Camden's objections to the commissioner's findings regarding her damages during detention of 17.986 days for repairs. As the Camden had already been scheduled for a two day layoff to have some of her bulkheads tightened, the Halsted is responsible for only 15.986 days detention.
>
> * * *
>
> The owner's recovery is limited to profits lost as a result of the collision.

In *Valdesa Compania Naviera, S.A.* v. *Frota Nacional de Petroleiros*, 348 F.2d 33, 39 (3d Cir. 1965), in an action by the charterer against the owner, and a cross-action, the Court held that where collision damage could be postponed until the annual drydocking, there could be no recovery of the cost of drydocking or of loss of profits from an immediate drydocking to make the repairs, rather than waiting until the annual drydocking, saying:

> It is obvious, in addition, that the amount of profits and costs awarded for days lost in Curacao and in the later drydocking for deferred repairs must be reduced for any days that would have been lost by the annual drydocking.

In *Compania Punta Alta, S.A.* v. *Dalzell*, 162 F.Supp. 926 (S.D. N.Y. 1958), the district court in affirming the findings of the Special Master, who had denied a claim for loss of hire when collision repairs were made to the vessel during its annual overhaul, at page 932, said:

> The commissioner found that respondent ought not to be charged with loss of hire for the period during which the collision repairs were being made.

This ruling was presumably based upon subsidiary findings that the collision repairs could have been accomplished at the time of the next annual survey and that the ship would necessarily be laid up then so that the collision repairs would not have caused any loss of hire.

Atlantic Song relies on the case of *Atlantic Refining Company* v. *Matson Navigation Company,* 150 F.Supp. 516 (D.C. Pa. 1957), affirmed 253 F.2d 777 (3d Cir. 1958). There damages resulting from a collision were repaired immediately following the collision. Defendant contended the repairs should have been postponed until the regular annual overhaul, scheduled for more than a month in the future. There the damage from the collision was to the vessel's bottom. Defendant sought to escape liability for the drydocking and argues that "though the repair of the tort damage was immediately necessary, . . . (plaintiff) cannot charge it for time and costs which had to be incurred" at the annual overhaul. The Court rejected this contention. However, Judge Hastie, in a concurring opinion stated "I find it harder to decide this case than do my colleagues." He continued by saying that since the cost of drydocking at the annual overhaul scheduled for a month later would have been the same, it was arguable "that the subsequent wrong, which caused only a rescheduling of the drydocking" would not have added extra costs. He quoted from Multiple Causation and Damage, 1934, 47 Harv.L.Rev. 1127, 1130, where Chief Justice Peaslee made a rationalization of such situations:

> " * * * On the one hand is sufficient wrongful causation of a physical result, and on the other, inevitable loss not increased by the defendant's wrong. Recovery would make the plaintiff better off than he would have been if the defendant had done no wrong. So long as the innocent cause is in actual, inescapable operation before the wrongful act be-

> comes efficient, it is not apparent how the latter can be considered the cause of the loss. Causation is matter of fact, and that which is not in fact causal ought not to be deemed so in law. The defendant's act may have furnished some cause for the * * * [loss], but causing * * * [it] at that time and under those circumstances did not injure the plaintiff, and neither moral justification nor logic would charge the wrongdoer for damage which he had not caused."

and continuing, Judge Hastie said:

> This line of thinking apparently has persuaded the British courts that a tortfeasor should not be charged with the damage in question in a case like this. Thus, Lord Phillimore, summing up his prevailing view in the House of Lords, said:
>
> > "If a vessel has got to go into drydock for a periodical survey * * * or to repair previous damage, her detention for repairs due to some collision which occurs after the previous damage or after the determination to put her into drydock has been made, will not be a charge against the wrongdoer; otherwise it will."
>
> Commissioners v. Owner of S.S. Chekiang, [1926] A.C. 637, 653. Cf. Carslogie S. S. Co. v. Royal Norwegian Government, [1952] A.C. 292 (H.L.)

Then he said, "These arguments give me concern, yet I doubt there is any clearly correct solution of these odd multiple cause cases." He justified the decision of the court saying the "tort made drydocking essential as soon as possible and in fact caused a rescheduling of the drydocking a month earlier than had originally been arranged," and therefore "it was permissible for the court below to find that [tortfeasor] should in fairness bear the drydocking cost."

Here, the drydocking was done at the scheduled annual overhaul. Since the annual overhaul required the scraping and painting of the bottom, drydocking was there required.

Atlantic Song also refers to *United States* (*SS Clarke Wharf*) v. *Standard Oil Company* (New Jersey), *and the Tanker Fred W. Wheeler,* 1960 A.M.C. 2106 (S.D. N.Y. 1960). But there, the issue was whether the work was required to be done immediately, or should have been done later in less time and more cheaply. The Court held that the decision to repair at once was reasonable.

II

(b) Must ten (10) days be deducted from the claim of *Atlantic Song* as a result of replacement of oil gland seal on the vessel's propeller, following a finding of a wire around the shaft of the propeller?

After the *Atlantic Song* had been drydocked in Gothenburg, Sweden—after completion of her voyage—a piece of wire cable about six feet long and about 1½ inches in diameter was found wrapped around the propeller shaft, in the space between the propeller and the oil gland. It had partially worn away the heads of some of the bolts holding the outer shield for the oil gland in place. It appears that the oil gland or shield did not need replacing, but that the eight bolts holding the gland in place should be replaced. The shipyard workers removed all of the eight bolts at one time, causing the gland to pop out. The surveyor then thought the gland should be replaced. It was learned a gland could be obtained in Germany. However, because of a strike in Germany, substantial delay was experienced in obtaining the oil gland shield, as a result of which the vessel remained in drydock for a total of ten days until the part was delivered and installed.

The more credible evidence in this case establishes that the wire found around the propeller shaft was in no way connected with the accident. One expert expressed the opinion the wire came from the *Central Trust* because he saw a picture of the *Central Trust* showing a wire hanging over its side. There was no showing when the wire was hung over the side, whether it was there immediately before or immediately after the accident, and as to its length. In fact, the expert answered the hypothetical question by saying that "if the wire was down, hanging, at the time of collision," that "it would relate together and would bear a lot on it was a part of the casualty." Two experts for *Central Trust* said the wire around the propeller shaft did not result from the collision. One of them said the wire shown in the picture was not the same size wire found around the shaft. Further, that if it had occurred in the collision, there would be considerable damage to the propeller, and that it would be most unlikely the vessel would have had a six foot piece of wire on board, or that the winding of a wire around the shaft would have cut off at six feet, without damage to the propeller. *Atlantic Song's* own surveyor, Kleflund, felt the collision had nothing to do with the wire. He attributed the wire to another incident. Surveyor Hanson was also of the opinion the wire did not result from the collision.

It is clear that the work on the oil gland required the full ten day period of drydocking, and that it was in no way related to the collision.

Atlantic Song says that it is well settled that if a vessel enters a shipyard for repairs resulting from a collision, the owner can utilize that time to do other work or repairs, and "[s]o long as the owner's work does not lengthen the amount of repair time required, no deduction should be made from the owner's loss of use claim." With this I agree. See *The Clyde case, supra; Atlantic Refining Company* v. *Matson Navigation Company, supra.*

Repairing the oil gland, which was not related to the accident, made it necessary for the vessel to remain in drydock for ten days. Defendants cannot be charged with this expense. However, repairs resulting from the collision keep the vessel out of service through the 19 plus days period, and *Central Trust* is only entitled to a credit for the stay in drydock.

III

> (c) Whether or not the time charterer of the *Atlantic Song* has any legal status to recover alleged damages from the owners of the *SS Central Trust* in addition to that claimed by the owner.

There is no dispute of the fact that the *Atlantic Song* was owned by Rederi A/B Soya, and that it was time chartered to Atlantic Container Line, Ltd., a Bermuda corporation. It is on a Baltic and International Maritime Conference Standard Uniform Time Charter, similar to those used by numerous shipowners. However, Atlantic Container says that the circumstances under which the parties entered into the charter are pertinent. That is, Atlantic Container is a consortium, whereby certain companies—from different countries—banded together to set up a unique service. They say Rederi A/B Soya, the owner of *Atlantic Song*, was a twenty percent (20%) owner of Atlantic Container, the charterer, and that the charter fees were fixed at a minimum to allow the profit to flow to the charterer, Atlantic Container. It is admitted Atlantic Container is a separate and distinct corporation from Rederi A/B Soya, and Atlantic Container has no ownership or proprietary interest in *Atlantic Song*. There is no contention defendants had any knowledge of the charter agreement, or that the injury was other than accidental.

Central Trust says the claim of Atlantic Container is foreclosed by the decision of the Supreme Court in *Robins Dry Dock & Repair Company* v. *Flint*, 275 U.S. 303 (1927), which admittedly has not been overruled. That was "a libel by time charterers of the steamship Bjornefjord against the Dry Dock Company to recover for the loss of use of the steamer." The district court and Court of Appeals permitted recovery. In the charter, provision was made to dock the vessel once in each six months, and payment of the hire was to be suspended until the vessel was again in proper state for service. While docked on one of these occasions, the Dry Dock Company damaged the propeller, requiring an extended time for repair. The claim of the owner was settled and the charterer brought action for its loss of use of the vessel. After deciding there was no basis of recovery under a contract, or as a third party beneficiary under any contract, the Court said it would "proceed to consider the other grounds upon which it has been thought that a recovery could be maintained." [275 U.S. 308]. The district court had allowed recovery on the ground the charterer had a "property right" in the vessel. The Supreme Court said the "question is whether the respondents [charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter." Continuing, the Court said:

> Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons, as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's con-

tract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U.S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank* v. *Ward*, 100 U.S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller*, [1922] 1 K.B. 127, 139, 140. *Byrd* v. *English*, 117 Ga. 192. *The Federal No. 2*, 21 F.(2d) 313.

* * *

The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents. The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not there is no analogy to the present case when the owner recovers upon a contract for damage and delay. *The Winkfield* [1902] P. 42. *Brewster* v. *Warner*, 136 Mass. 57, 59.

In *Agwilines, Inc.* v. *Eagle Oil & Shipping Co.*, 153 F.2d 869 (2d Cir. 1946), cert. denied 328 U.S. 835, the contention was made that the owner should be allowed to sue for the charterer's loss on the same theory that a ship recovers as bailee of her cargo for cargo losses. To this contention the Court said, "To that, however, *Robins Dry Dock & Repair Co.* v. *Flint* . . . is an answer." Continuing, the Court, speaking of the decision in the *Robins* case, said, "It thought that the only basis for charging the drydocker with liability was because he had prevented the performance of the charterparty by the promisor—the owner—and that interference by a third person with the performance of a contract was an actionable wrong only if it was intentional." "The Court thought it irrelevant that this resulted in exonerating the drydocker from nearly all liability through the fortuity that the profitable use of the ship had been divided between the owner and the charterer . . . ." [153 F.2d 871].

In *Dampskibsaktieselskabet Den Norske* v. *Intalco Alum. Corp.*, 306 F.Supp. 170 (W.D. Wash. 1969), in dealing with a claim of the time charterers for demurrage, the Court said, "Jebsens, as time charterer, has no direct right to recover against the Tort-feasor of owner Wilhelmsen," citing the *Robins* case. In *Guarrasi* v. *Panama Canal Co.*, 271 F. Supp. 678, 680 (Canal Zone 1967), the master and crew of a vessel sought damages because of negligence of employees of the Canal Co. causing damages to the vessel, necessitating a delay for repairs. The Court denied any such claim, basing its holding on the *Robins* case. See the excellent opinion of Judge Watkins in *Henderson* v. *Arundel Corp.*, 262 F. Supp. 152 (D.C. Md. 1966), and cases there cited. See also opinion in *The Agwidale*, 61 F. Supp. 191 (S.D. N.Y. 1945),[4] and cases there cited, where the Court held that decisions of earlier courts allowing "the time charterer to recover for negligent damage to his con-

[4] Affirmed 153 F.2d 869, opinion by Judge L. Hand. See above.

tract right, . . . are overruled by the *Robins* case." Again, the commissioner said the "time charterer cannot, however, sustain a collision suit to recover hire paid during the repair period and the shipowner cannot sue as 'bailee' of the charterer." [61 F. Supp. 198]. The commissioner cited with approval—as did the Court of Appeals—the case of *Chargeurs Reunis* v. *English & American Shipping Co.*, 1921, 9 Lloyd's List L. R. 90 (Admiralty Division), affirmed at page 464 by the Court of Appeals as directly in point there, as it is here. There he said:

> In those circumstances the French Government (time charterer) had no cause of action arising out of the negligence of the Medira. That means this: that if there is to be any recovery at all it can only be a recovery by the owners.

After quoting the commissioner's report, and approving same, the Court said, "the charterer has no cause of action against the party damaging the ship." [61 F. Supp. 199].

The measure of damages seems clear, that is, "damages for the detention of a commercial vessel are to be measured by the profits which the owner would have realized from her use, had she been free. *The Potomac*, 105 U.S. 630, 26 L.Ed. 1194; *The Conqueror*, 166 U.S. 110, 133, 17 S.Ct. 510, 41 L.Ed. 937." *Aquilines, Inc.* v. *Eagle Oil & Shipping Co.*, *supra* [153 F.2d 870].

Atlantic Container says there is ample authority in the law to support the right of a time charterer to recover from a vessel which negligently collides with the chartered vessel for the charterer's loss of use during repairs. It cites-*Hines* v. *Sangstad S.S. Co., et al.*, 266 F. 502 (1st Cir. 1920); *The Beaver*, 219 F. 134 (9th Cir. 1915); and *The Aquitania*, 279 F. 239 (S.D. N.Y. 1920). Admittedly, these cases were overruled by the *Robins* case, but Atlantic Container says it is not merely a charterer, and that the progress of the law since the decision in the *Robins* case

would justify the Court in permitting recovery. In effect, they say changes in the law make it clear that if and when this issue is again presented to the Supreme Court, it is very likely to overrule the *Robins* case. This reasoning may be sound. But, as the United States Court of Appeals for the Fourth Circuit said in *United States* v. *Smith*, — F.2d —, decided August 3, 1971, in footnote 1, "a subordinate court should not reach out to anticipate the Supreme Court's future resolution of the point." Again, in *Harris* v. *Deere and Company*, 223 F.2d 161 (4th Cir. 1955), the Court said "It is not for us, however, to overrule or modify decisions of the Supreme Court."

IV

(d) Whether the *Central Trust* is entitled to recover detention for the days after her departure from the shipyard and while awaiting a berth at Houston.

The *Central Trust* was off-hire from 1300 on November 24, 1969, until 0800 on January 19, 1970. Plaintiffs admit *Central Trust* is entitled to recover for off-hire from the above November date until January 14, 1970. The repairs to the vessel were completed January 14, 1970, at 1600, but a loading berth was not available at Houston until January 19th. It was necessary for *Central Trust* to shift from Beaumont, Texas, where it was repaired, to Houston, and at Houston await a loading berth.

The time charterer required the vessel to be in Houston on the 19th. It ordered the vessel to anchor for waiting. The measure of collision damages is the loss of earnings during the period necessary repairs are being made. *The Pocahontas*, 109 F.2d 929, cert. denied 310 U.S. 641.

In summary:

(a) Five days must be deducted from the claim of 19 days, 18 hours, 21 minutes required for all work on the vessel, for the reason the vessel was already scheduled for a five day out-of-service overhaul, requiring drydocking.

(b) Ten days—five days in addition to the five days in (a)—of ten days—should be deducted from the total days the vessel spent in drydock, but a total of only five days is to be deducted from loss of hire of the vessel.

(c) The time charterer of the *Atlantic Song* does not have legal standing to recover from the defendants any damages for loss of profits or loss of hire of the vessel.

(d) *Central Trust* is not entitled to recover damages for loss of hire or detention for the days after her departure from the shipyard and while waiting at Houston for a berth.

Counsel will within ten days present a duly endorsed order in conformity with this opinion. In the event counsel cannot agree on the form of the order, counsel will give notice to opposing counsel of the time of presenting a proposed order, attaching to such notice a copy of the proposed order.

RICHARD B. KELLAM,
United States District Judge

Norfolk, Virginia
September 9th, 1971

Final Order

IN THE

UNITED STATES DICTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

REDERI A/B SOYA, as owner of the M/V ATLANTIC SONG and ATLANTIC CONTAINER LINE, LTD.,

Petitioners,

versus

EVERGREEN MARINE CORPORATION, S.A. and S. S. CENTRAL TRUST, her engines, boilers, etc.,

Respondents.

This cause came on this day to be heard and it appearing to the Court that the parties have reached an agreement upon many items of provable damage sustained by the owners of each vessel, said agreement being set forth in the Orders on Pre-Trial Conference of April 23, 1971, and May 11, 1971, and that in addition to the agreed items set forth in said pre-trial orders, additional items of provable damage have now been agreed upon, and set forth below is a summary of the provable damages upon which agreement has been reached:

PROVABLE COLLISION DAMAGES AGREED TO HAVE BEEN SUSTAINED BY OWNER OF ATLANTIC SONG

1. AB Gotaverken, Gothenburg
   Collision repairs $112,042.00
2. Newport News Shipbuilding, Virginia
   Collision repairs 18,892.00

3. Lloyd's Register of Shipping Classification survey	272.00
4. Einar Elvrum, Billingstad Purchase of new lifeboat	3,720.00
5. Davit—Company N.V., Utrecht Purchase of davits	2,566.00
6. Sjofartsverkets Centralforvaltning, Sthlm Expenses of telex	9.00
7. AB Bromma Smides Verkstad, Stockholm Purchase of lashings	856.00
8. Seasafe Transport AB, Stockholm Purchases of lashings	877.00
9. Motorships, Inc., New York Expenses for telex	104.00
10. Atlantic Container Line AB, Gothenburg Port charges	2,230.00
11. Atlantic Container Line, Ltd., Southampton Port charges, survey and various costs	16,824.00
12. Additional repairs at Antwerp Connecting up ventilating fan motors	115.00
13. Fixed overtime payment which, had there been no collision, would have been paid by Atlantic Container Line to owner	659.00
14. General Expenses	5,311.45
TOTAL AGREED COLLISION PROVABLE DAMAGES	$164,477.45

Final Order

PROVABLE DAMAGES SUSTAINED BY ATLANTIC CONTAINER LINE, LTD.

1.	Loss of Containers	$ 22,059.00
2.	Repairs to Damaged Containers	3,900.00
3.	Ramsey, Scarlett & Co., Inc. Port Disb. acct.	118.75
4.	Photo Craftsmen, Inc. Invoice No. 49558—Photographs of container damage	384.00
5.	Bunkers consumed during off-hire	1,158.20
6.	Alfred L. Nicholson, Marine Surveyor Survey of containers, etc.	1,780.45
	TOTAL	$ 29,400.40

PROVABLE DAMAGES SUSTAINED BY OWNER OF CENTRAL TRUST

1.	Bethlehem Steel Corporation Collision repairs	$204,743.00
2.	Fuel consumed during repair period	1,775.00
3.	Bureau Veritas Classification surveyor's fee at Beaumont	2,236.00
4.	Expenses of Port Captain I. H. Chang	2,080.00
5.	Cost of replacing port anchor	3,809.00
6.	Loss of boatswain's stores	5,000.00
7.	Agent's fees and port charges	2,611.00
8.	Cables and telephone charges	163.75
9.	Bethlehem Steel Corporation Additional charges	1,639.00

10. General deck and engine stores consumed during off-hire period	1,989.47
11. Bow damage photographs	99.67
12. Robert K. Hanson	
Surveyor's fee and expenses at Beaumont	719.00
TOTAL AGREED COLLISION PROVABLE DAMAGES	$226,864.89

AGREED CARGO PROVABLE DAMAGES

The below-named owners of cargo aboard the *Atlantic Song* are entitled to recover from the defendants the sums set forth below which constitute additional items of provable damage sustained by the owner of the *Central Trust*.

Owens-Corning Fiberglas Corp.	$ 2,674.13
Danfoss A/S	16,674.08
A/C Eclab Export, S. A.	682.88
Owens-Corning Fiberglas Corp.	1,000.00
W. E. Cox & Co.	750.00
Total	$21,781.09

And the parties being unable to agree on the remaining issues of damages, these issues came on for hearing before the Court, and the Court having heard the evidence and oral argument, having read the briefs, and having considered all matters of law and fact, filed its Memorandum Opinion on September 9, 1971.

NOW, THEREFORE, it is ADJUDGED, ORDERED AND DECREED as follows:

1. That the Court's Memorandum Opinion dated September 9, 1971, be and hereby is adopted as its findings

of fact and conclusions of law pursuant to Rule 52 of the Rules of Civil Procedure.

2. That five (5) days be deducted from the total loss of use claim of 19 days, 18 hours and 21 minutes asserted by the owner and time charterer of the *Atlantic Song,* thus reducing the detention period for *Atlantic Song* to 14 days, 18 hours and 21 minutes, which, at the agreed charter hire rate of $3,860.00 per day, totals $57,128.35, and constitutes provable damages of the owner of *Atlantic Song* in this amount.

3. That the owner of the *Atlantic Song* is entitled to no damages by reason of the replacement of the oil gland seal on the vessel's propeller.

4. That the time charterer of the *Atlantic Song,* i.e., Atlantic Container Line, Ltd., has no legal standing to recover for loss of profits, or loss of hire, from the owners of the *Central Trust* and is therefore entitled to no recovery from defendants by reason of the detention of the *Atlantic Song* for repairs.

5. That the *Central Trust* is not entitled to recover damages for loss of hire or detention beyond 1600 hours on January 14, 1970, this being the time the collision repairs to that vessel were completed, but has sustained provable damages in the form of loss of hire up until this date, or 51 days and 3 hours, which at the agreed rate of $1,146.66 per day totals $58,622.97.

6. That the total provable damages sustained by the parties are as follows:

Atlantic Song

Total agree collision damages	$164,477.45
Damages for loss of use	57,128.35
Total	$221,605.80

Final Order

Atlantic Container Line, Ltd.

Total agreed damages	$ 29,400.40

Central Trust

Total agreed collision damages	$226,864.89
Damages for loss of use	58,622.97
Amount due by *Central Trust* to *Atlantic Song* cargo owners	21,781.09
Total	$307,268.95

7. That Rederi A/B Soya, the owner of the *Atlantic Song,* and Atlantic Container Line, Ltd. shall recover of and from the defendants 75 percent of their provable damages as set forth above, plus taxable court costs, and that Evergreen Marine Corporation, S. A., the owner of the *Central Trust*, shall recover from the plaintiffs 25 percent of its provable damages as set forth above, plus taxable court costs, resulting in a net recovery by Rederi A/B Soya and Atlantic Container Line, Ltd. of the sum of $111,437.41 (plus any balance of court costs in its favor), together with interest at 6 percent per annum from the date of this Order.

As to all actions of the Court adverse to their interest, each party duly notes its objection.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
September 21st, 1971

Seen:

/s/ HUGH S. MERIDITH
Of Counsel for Rederi A/B Soya and
Atlantic Container Line, Ltd.

/s/ R. ARTHUR JETT, JR.
Of Counsel for Evergreen
Marine Corp.

/s/ FRANCIS N. CRENSHAW
Of Counsel for Owens-Corning
Fiberglas Corp., et als.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-2050

REDERI A/B SOYA, as owner of the M/V ATLANTIC SONG, and ATLANTIC CONTAINER LINE, LTD.,

Appellants,

versus

EVERGREEN MARINE CORPORATION, S. A., and SS CENTRAL TRUST, her engines, boilers, etc.,

Appellees.

No. 71-2051

REDERI A/B SOYA, as owner of the M/V ATLANTIC SONG, and ATLANTIC CONTAINER LINE, LTD.,

Appellees,

versus

EVERGREEN MARINE CORPORATION, S. A.,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia at Norfolk. Richard B. Kellam, District Judge.

Argued April 12, 1972. (Decided May 9, 1972)

Before Haynsworth, Chief Judge, Boreman, Senior Circuit Judge, and Winter, Circuit Judge.

David C. Wood (Hugh S. Meredith, and Vandeventer, Black, Meredith and Martin, and Hill, Betts, and Nash on brief) for Appellants in No. 71-2050, and for Appellees in No. 71-2051; R. Arthur Jett, Jr., Jett, Sykes and Berkley, and Furr and Heilig on brief) for Appellees in No. 71-2050, and for Appellants in No. 71-2051.

Per Curiam:

After consideration of the briefs and oral argument, we affirm on the opinion of the District Court. Until the Supreme Court chooses to reconsider *Robins Dry Dock & Repair Company* v. *Flint*, 275 U.S. 303, that decision is binding upon us.

Affirmed.